STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

IBEW, LOCAL UNION NO. 2150, Complainant, vs. CITY OF OCONOMOWOC, Respondent.	Case 44 No. 41348 MP-2164 Decision No. 25818-B

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Milwaukee, Wisconsin 53202, by Mr. William S
Lindner and Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, 10th F

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

IBEW, Local Union No. 2150, hereinafter the Complainant, having, on December 2, 1988, filed with the Wisconsin Employment Relations Commission a complaint of prohibited practices wherein it alleged that the City of Oconomowoc,
hereinafter the Respondent, has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) by refusing to bargain with Complainant and by conditioning further bargaining upon Complainant relinquishing the right to represent certain employes in the bargaining unit represented by Complainant; and the Respondent having, on December 30, 1988, filed an answer to the complaint wherein it denied it has committed any prohibited practices and stated certain affirmative defenses; and Respondent having, on December 30, 1988, also filed with the Commission a Motion to Hold the Proceedings in this Matter in Abeyance Pending Resolution of a Petition for Unit Clarification, wherein it alleged that a determination in the unit clarification proceeding is a necessary condition precedent to a determination as to whether Respondent has a duty to bargain with Complainant; and the Commission having, on January 6, 1989, notified the parties telephonically that Respondent's motion was denied; and the Commission having appointed David E. Shaw of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held at Oconomowoc, Wisconsin on January 9, 1989; and Respondent having, at the conclusion of the hearing on January 9, 1989, orally moved to hold the record open in this case so as to include the record and decision in the unit clarification proceeding before the Commission in the record of this case; and the Examiner having reserved ruling on Respondent's motion pending receipt of the parties' written arguments on the motion; and the parties having filed briefs and reply briefs regarding Respondent's motion by February 2, 1989; and the Examiner having on February 10, 1989 granted Respondent's motion and ordered that the record in this matter remain open for the purpose of receiving the record and decision 1/ in the unit clarification case pending before the Commission; and the Commission having, on October 13, 1989 issued its decision in the unit clarification proceeding; 2/ and IBEW, Local 2150 having, on November 2, 1989, filed a petition for rehearing with the Commission; and the Commission having, on December 1, 1989, issued its Order Denying Petition for Rehearing; 3/ and the Examiner having, by letter of December 11, 1989 advised the parties that the record and decision in the unit clarification case had been received into the record in this case and that the parties had ten days to notify the Examiner if they wished to file additional briefs or the Examiner would proceed to decide the case based on the existing record; and neither party having filed such notice of intent to file additional briefs; and the Examiner having considered the evidence and the arguments of the parties and being fully advised of the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO, herein Complainant, is a labor organization and has its principal offices at 6227 West Greenfield Avenue, West Allis, Wisconsin 53214. Richard Darling is the Business Manager and Financial Secretary for the

1/ Case 1 No. 41440 ME/uc-0302.

2/ City of Oconomowoc, Dec. No. 6982-A, Dec. No. 7170-B (WERC, 10/89).

3/ Dec. No. 6982-B, Dec. No. 7170-C (WERC, 12/89).

Complainant.

2. The City of Oconomowoc, herein Respondent, is a municipal employer and has its principal offices at 174 East Wisconsin Avenue, Oconomowoc, Wisconsin 53066.

3. Wisconsin Council 40, AFSCME, AFL-CIO, herein AFSCME, is a labor organization and has its principal offices at 5 Odana Court, Madison, Wisconsin 53719. 4/

4. Pursuant to an election conducted by the Commission, 5/ IBEW Local Union No. 494 was certified as the bargaining representative of all manual employes of the City of Oconomowoc-Utility Commission employed in the electrical and water departments, excluding office and supervisory personnel. The City and Local 494 stipulated to said election and no hearing was held in the matter. Although there has been no formal change of the certified bargaining representative from IBEW Local 494 to IBEW Local 2150, since approximately 1972 the City's Utility Commission has negotiated contracts, the latest of which covered the period of January 1, 1987 through December 31, 1988, with Local 2150 covering the unit of Utility employes for which Local 494 had been certified as the bargaining representative. The IBEW unit currently consists of 13 employes: six (6) craft employes in the classifications of maintenance electrician (1), electric foreman (2), and lineman (3); a groundman on the electric crew; a water foreman, two water workers and a station operator; and, two meter readers.

5. Pursuant to an election conducted by the Commission, 6/ Oconomowoc City Employees, Local 1747, AFSCME, AFL-CIO, was certified as the bargaining representative of all employes of the City of Oconomowoc employed in its Department of Public Works and Parks Department, excluding supervisors, assistant city engineer, office clerical and all other employes. The collective bargaining agreement between the City and AFSCME for the period of January 1, 1987 through December 31, 1988 described the bargaining unit as "the regular full-time employees of the City of Oconomowoc employed in its Department of Public Works, Parks and Forestry Department and Waste Water Treatment Plant, excluding Supervisors, Assistant City Engineer, Office Clerical Workers and all other employees". The AFSCME unit currently consists of 18 City employes; nine in the Department of Public Works, five in the Parks and Forestry Department, and four in the Wastewater Treatment Plant. The following job classifications are covered by the AFSCME contract; mechanics, tree trimmer, equipment operators, truck driver, laborer (I and I-A), wastewater treatment plant operator, laboratory technician, sewer systems and plant maintenance worker (A and B), and utility person.

6. Effective August 19, 1958, the Oconomowoc City Council created a Water and Light Commission, herein Utility or Utility Commission, consisting of five members appointed by the Council. None of the said five members could be Council members. The Mayor was an ex-officio member of the Commission without any voting power. The Utility was responsible for providing electrical and water service to the residents and businesses of the City. The Utility Commission adopted annual budgets without any Council subsidy, input or approval. The City has loaned money to the Utility for cash flow purposes at reasonable interest rates. The Utility funded its operation through user fees which fees were regulated by the Public Service Commission (PSC). The Utility purchased and titled vehicles for its own use separate from the City purchases of vehicles. The Utility insured its vehicles through a different company than did the City. Both the City and Utility employes were covered by the same policies for life insurance, health insurance, and short-term disability insurance. The Utility reimbursed the City for the costs of those insurance programs for the Utility employes. The Utility employes, but not the City employes, were covered by a long-term disability insurance policy. The Utility had a bank checking account separate from the City accounts. Checks written on the Utility account were signed by the City Clerk, the City Treasurer and the Utility Commission President. The Utility did not own any real estate. The City held title to all real estate. The Utility did enter into contracts without getting approval from the City Council. In July 1986, the Utility and the Soo Line Railroad entered into an agreement for an easement for an underground wire crossing for which the Soo Line Railroad received monetary compensation from the Utility. The agreement was signed by the City Clerk and the Utility Director. In April 1983, only the Utility Director signed an agreement under which utility poles were purchased from the Utility by the Wisconsin Telephone Company. The Utility employes worked and stored equipment in approximately one-half of a City-owned building. The other half of the building was utilized by the City Department of Public Works (DPW). There is a door in the wall which divides the building into the parts occupied by DPW and

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4/ Based on the Examiner's review of the record, Findings of Fact 3 through 14 have been adopted from the Commission's Findings of Fact in Dec. No. 6982-A, Dec. No. 7170-B.

5/ City of Oconomowoc-Utility Commission, Dec. No. 6982 (WERC, 1/65).

6/ City of Oconomowoc, Dec. No. 7170 (WERC, 7/65).

the Utility. At the time of the hearing, the Utility was in the process of moving into a newly constructed building also owned by the City. The Parks and Forestry employes and equipment will then share the existing building with the DPW. The Utility hired its own director and employes, set work rules for its employes and negotiated collective bargaining agreements with the IBEW. Although the Utility employed the same attorney for its labor negotiations as did the City, the Utility was billed separately by the attorney for his services to the Utility. Payroll data was entered into the City's computer system by a Utility employe, but the payroll checks for Utility employes were issued by the City. The City billed the Utility for that service.

7. Prior to June, 1988, there had been infrequent interchange of personnel between the Utility and DPW. A few times each year, Utility employes would assist DPW wastewater treatment plant operators with pump and/or electrical problems. There has been occasional interchange of vehicles, such as pickups and bucket trucks, between the Utility and DPW. Usually these instances involving employes and/or vehicles did not result in any interagency billings, unless the costs could be billed to a third party other than the City or the Utility. Occasionally, a Utility employe would operate a Utility-owned dump truck to assist the DPW crews in snow removal and DPW would be billed for the operator's time. There may have been occasional instances when DPW employes and Utility employes worked together to patch streets after the Utility employes repaired broken water mains, although the patching is usually performed by DPW employes. Both the DPW and the Utility employ a mechanic to maintain their respective vehicles. Although they perform similar work, in the past the mechanics have worked only on their respective department's vehicles. The City has begun to have the mechanics work on all vehicles, rather than just the vehicles from the department to which they are assigned. Electric and water employes frequently work together and share equipment. The Utility mechanic maintains vehicles for both the water and the electric crews. While water employes repair water main breaks, the electric foreman digs the hole which allows access to the break. Water crew employes have assisted electric crew employes in stringing overhead lines and in repairing storm damage. The electric crew's truck driver assists the water crew when an extra employe is needed. The meter readers read both electric and water meters. Other electric and water crew employes read meters when the meter readers are absent. Occasionally electric crew employes work on the meters.

8. Until March 1977, the City Treasurer collected revenues and performed fund investment and debt management for the Utility as the Utility's part-time Treasurer and Office Manager. The Utility reimbursed the City for one-third of the City Treasurer's salary for those services. In March 1977, the Utility hired an office manager who assumed the responsibility for collecting Utility revenues. The City Treasurer continued to perform, and currently is performing, fund investment and debt management for the Utility. At that time the Utility's share of the City Treasurer's salary costs was reduced from one-third to between 10 and 15 per cent. The City Treasurer reported separately to both the City Council and the Utility Commission on his respective responsibilities. In May 1982, the City Treasurer began to serve as the Utility's administrator and personnel officer and became responsible for: establishing performance standards for the Utility Director; evaluating the Director's performance; developing policies for the Utility in the areas of purchasing, budgeting, financial planning, personnel, customer communications and employe training; and, directing, coordinating and expediting the activities of the Utility. The City Treasurer reported directly to the Utility Commission concerning the foregoing responsibilities.

9. Effective June 20, 1988, the City Council adopted an ordinance which abolished the Utility Commission and vested control of the Utility in the City Council. The Council established a standing Utility Committee of three Council members. The other four standing committees of the Council are Finance, Public Services, Protection and Welfare, and Personnel. The City Administrator was made responsible for supervising the operation of the Utility. The Utility Director now reports to the City Administrator, along with the Director of Public Works, the City Clerk, the Finance Director and the City Engineer. In September 1988, the City Council approved the hiring of the current Utility Director. The 1989 Utility budget was submitted to the City Council for approval. The name of the Utility's checking account was changed from "City of Oconomowoc Utility" to "City of Oconomowoc-Electric Utility." Checks are now signed by the City Comptroller, rather than the Utility Commission President, the City Clerk and City Treasurer. Now the same insurance policy covers all City-owned vehicles, including those used by the Utility employes. The City, rather than the Utility, holds title to the Utility vehicles and purchases those vehicles. Due to PSC regulations which require separate accounts for Utility revenues and expenses, the Utility still reimburses the City for such things as the cost of health, life and short-term disability insurance coverage for Utility employes.

10. Following the elimination of the Utility Commission, the following organizational changes were implemented: five waste water treatment operation employes, including the manager, are now supervised by the Utility Director, rather than Director of Public Works; an administrative secretary is now supervised by the City Clerk, rather than the Utility Director; and, eight positions, i.e., one office supervisor, one billing coordinator, one

bookkeeper, two meter readers, two customer service clerks and one inventory clerk, are now supervised by the City Finance Director, rather than the Utility Director. The Utility Director now oversees 18 employes, two of whom are supervisors. At the hearing the parties stipulated that the following six Utility employes are craft employes: two electric foremen, Gary Kopps and James Kleinschmidt; two journeyman linemen, Tim Lauer and Dan Jarocki; one apprentice lineman, Tim Stelpflug; and, one maintenance electrician, Charles Schneider. Non-craft Utility employes in the IBEW unit, who are supervised by the Utility Director, are: a water foreman (John Huebner), two water workers-1st class (Elliot Connor and Steve Roush), a station operator (William Newbecker) and a groundman (Michael Moore). The Utility Director also supervises a draftsman, who is not in a bargaining unit, and four waste water treatment employes, three of whom are in the AFSCME unit.

11. Excluding the stipulated craft positions, there is a similarity in the levels of occupational skills for the employes in the IBEW and AFSCME units. An individual seeking employment in the Water Utility should be mechanically inclined and have some knowledge of water mechanics, chemicals, the installation and operation of water mains and valves, and the repair of hydrants. The Electric Utility looks for applicants with some educational and/or work back-ground in electricity so they are familiar with basic electricity, functions of an electric utility and how certain electrical equipment operates. There is a four year apprenticeship program for the craft positions. Craft employes attend seminars relating to their duties. The job descriptions for certain of the positions in the AFSCME bargaining unit also list desired entry level skills and knowledge similar to those of the Water Utility positions. Mechanical ability is desirable for the Laborer I position. The Laborer II and III classifications list the following as part of the desirable qualifications: "Knowledge of sound principles and practices in operation of motorized equipment. Working knowledge of safe and effective operations of specialized equipment, mechanical aptitude." The Senior Mechanic classification lists as desirable qualifications "Thorough knowledge of shop tools, equipment, materials and shop practices. Skills in mechanical repair work and welding . . . ." and "mechanics trade training and five years of skilled experience in mechanical repair work in the automotive field." Wastewater Treatment Plant Operators must either possess or be able to attain state certification and have a "general knowledge of wastewater operations, good knowledge of mechanical and electrical equipment found in wastewater plants". The Wastewater Laboratory Technician should have "Knowledge of basic principles of chemical, physical and bacteriological examination and treatment of wastewater, sludge, effluent and by-products. Knowledge of standard laboratory principles, technology and equipment." Water employes maintain water meters and pumps, install equipment, such as water mains, valves, boxes and meters, take water samples, and monitor water flow. Electric employes install and maintain electrical equipment, such as overhead and underground power lines, street lights, meters, and traffic controls, perform tree trimming, and handle customer problems. Public Works employes maintain and clean City buildings and facilities, perform street work, such as patching, ditching, culvert work and dam maintenance, and plow and remove snow. Parks and Forestry employes maintain City parks and grounds including ball diamond maintenance, grass cutting, building maintenance and snow removal. Waste Water Treatment Plant employes operate and maintain the City's sewerage system and treatment plant, including lift stations and meters. The plant operators read flow charts and meters, check equipment and take samples. The laboratory technician conducts tests and documents the results.

12. The hourly wage rates effective January 1, 1988 for the classifications covered by the AFSCME contract range from $9.88 to $10.57 for new employes and from $10.99 to $11.73 for employes after one year (schedule maximum). The hourly wage rates, effective January 1, 1988 for the craft employes covered by the IBEW contract range from $14.70 to $16.15, while the hourly wage rate for the water foreman was $14.45. The hourly wage rates, effective January 1, 1988, for the other classifications covered by the IBEW contract have the following ranges: start - $8.34 to $9.26; after one year - $9.39 to $10.42; and, after two years (schedule maximum) - $10.64 to $11.81.

13. The IBEW and AFSCME employes have similar hours of work. The normal hours of work for the IBEW employes are Monday through Friday from 7:30 a.m. to 12:00 noon and from 12:30 p.m. to 4:00 p.m. for a total of eight (8) hours per day and forty (40) hours per week. Except for the second shift Waste Water employes, the AFSCME employes normally work Monday through Friday from 7:00 a.m. to 12:00 noon and from 12:30 p.m. to 3:30 p.m. for a total of eight hours per day and 40 hours per week. Waste water employes on the second shift work from 3:00 p.m. to 7:30 p.m. and from 8:00 p.m. to 11:30 p.m. Both groups of employes are paid at the rate of one and one-half their regular rate for all hours worked in excess of 40 hours per week and have the option of choosing compensatory time off in lieu of overtime pay. Both groups of employes receive a twenty (20) minute coffee break in the forenoon only and 10 minute clean-up periods prior to both the noon break and the end of the work day. The two groups have the following common or identical fringe benefits: short term disability insurance, health insurance, life insurance, employer paid contributions to the Wisconsin Retirement Fund, sick leave accumulation at the rate of one and one-half (1-1/2) days per month of service to a maximum of ninety (90) days, unpaid leaves of absence for personal reasons for a maximum

of thirty (30) days, funeral leaves, worker's compensation benefit supplements, longevity pay, the number of paid holidays and overtime pay for work on holidays. The vacation schedule for both groups is the same, except IBEW employes receive five weeks after 20 years while AFSCME employes receive five weeks after 23 years.

14. Based on the similarity of skills, wages, hours, fringe benefits and working conditions between the employes in the AFSCME bargaining unit and the non-craft employes in the IBEW bargaining unit, said groups of employes share a sufficient community of interest to warrant their inclusion in the same bargaining unit. Existing limited differences in duties, supervision and work place between the two groups of employes are insufficient to warrant continued existence of two separate bargaining units of non-craft blue collar employes when balanced against the statutory mandate against undue fragmentation of bargaining units.

15. The election petition filed by IBEW Local Union No.494 on November 10, 1964 indicated there were no craft employes in the organizing unit claimed, and there was no unit determination vote held in the election referenced in Finding of Fact 4.

16. Off and on since 1975 Darling has been the Complainant's bargaining agent representing the bargaining unit that consisted of the employes of the Utility Commission and was the bargaining agent for that bargaining unit in 1988 and at all times material subsequent thereto. In 1988, and at all times material subsequent thereto, Attorney Roger Walsh represented the Respondent in its negotiations and labor relations matters with Complainant. The parties exchanged letters to open negotiations to a successor agreement to the 1988 collective bargaining agreement between the Complainant and the Utility Commission. Subsequently Walsh called Darling on the telephone and advised him that it was the Respondent's intention to exclude the employes in the Water Department from the bargaining unit, but that the Respondent did not oppose Complainant's representing the employes in the linemen positions. The Complainant and Respondent, represented by Darling and Walsh, respectively, met on November 15, 1988 for the purpose of exchanging bargaining proposals for a successor agreement to the 1988 Agreement. After the parties had presented their respective proposals Walsh raised the issue of placing the employes in the Water Department in the bargaining unit represented by AFSCME and asked Darling for Complainant's position on the issue. Darling indicated the Complainant would not agree to give up the right to bargain for those employes. Walsh responded to the effect that the Respondent no longer recognized the Complainant as the bargaining agent for those employes, that the Respondent was a new employer and had no duty to bargain with Complainant and that the Respondent would file a petition with the Wisconsin Employment Relations Commission for a unit clarification. At all times material subsequent to the November 15, 1988 meeting the Respondent has refused to bargain with Complainant for a successor agreement covering the bargaining unit made up of all of the former employes of the Utility Commission.

17. On December 1, 1988 the Respondent filed a unit clarification petition with the Commission seeking to include the employes represented by Complainant in the bargaining unit represented by AFSCME. The Complainant opposed such an inclusion. AFSCME took no position on the matter. The Respondent based its request on its belief that the abolition of its Utility Commission caused the Utility employes to become City employes and that a separate bargaining unit of former Commission employes is not appropriate.

18. On December 2, 1988 the Complainant filed the instant complaint of prohibited practices with the Commission.

19. On October 13, 1989 the Commission issued its decision in the unit clarification case involving these parties wherein it made the following conclusions of law:

CONCLUSIONS OF LAW

1. During the period of August 18, 1958 to June 20, 1988, the Utility Commission was a separate municipal employer of its employes.

2. Effective June 20, 1988, the City became the municipal employer of the employes of the former Utility Commission.

3. A separate bargaining unit of former Utility Commission employes is not an appropriate unit with (sic) the meaning of Sec. 111.70(4)(d)2.a., Stats., in that it would unduly fragment bargaining units within the City's workforce.

4. The bargaining unit of all non-craft blue collar employes of the City is an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a. Stats.

5. The craft employes of the former Utility Commission, who now are employed by the City, would constitute an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats., and they are entitled to a vote to determine whether they desire to constitute a separate bargaining unit or to be included in the existing AFSCME bargaining unit of non-craft blue collar employes.

In its decision the Commission ordered that:

1. The non-craft blue collar employes of the former Utility Commission shall be, and hereby are, included in the bargaining unit of City employes represented by Local 1747, AFSCME, and therefore the description of said unit is hereby amended to read as follows:

All regular full-time and regular part-time blue collar employes of the City of Oconomowoc, excluding supervisors, assistant city engineer, office clerical workers and all other employes and conditionally excluding craft employes.

2. An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the following voting group:

All regular full-time and regular part-time electrical craft employes of the City of Oconomowoc, excluding supervisory, managerial, confidential and all other employes who were employed on October 13, 1989, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining: (1) whether a majority of employes in said voting group desire to be included in the same bargaining unit with the non-craft employes, which unit is described in Conclusion of Law 1 above and to be represented by Oconomowoc City Employees, Local 1747, AFSCME; and (2) if a majority of the employes in said voting group vote not to be included with the non-craft employes, whether a majority of the electrical craft employes voting desire to be represented in a separate bargaining unit by the International Brotherhood of Electrical Workers, Local Union No. 2150, for the purposes of collective bargaining with the City of Oconomowoc on questions of wages, hours and conditions of employment, or to be unrepresented.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. During the period of August 18, 1958 to June 20, 1988, the Utility Commission was a separate municipal employer of its employes.

2. Effective June 20, 1988, the Respondent City of Oconomowoc became the municipal employer of the employes of the former Utility Commission.

3. A separate bargaining unit of former Utility Commission employes is not an appropriate unit within the meaning of Sec. 111.70(4)(d)2.a., Stats., and, therefore, the Respondent City of Oconomowoc did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by refusing to bargain with Complainant for a successor collective bargaining agreement covering those employes, and by its actions did not discourage membership in a labor organization within the meaning of Sec. 111.70(3)(a)3, Stats.

On the bases of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 7/

7/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

The instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of February, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

David E. Shaw, Examiner

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(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Complainant alleges that the Respondent committed prohibited practices under MERA by withdrawing recognition from Complainant, by refusing to bargain further with Complainant, by conditioning any further bargaining upon an unlawful condition--that Complainant relinquish its bargaining rights as to certain Water Department employes, and, in so doing, attempted to discourage union membership.

In its answer, the Respondent denies it has committed prohibited practices and that it had a prior bargaining relationship with the Complainant and denies that the Complainant is the certified bargaining representative of the employes of the former Utility Commission. The Respondent also asserts as an affirmative defense that Complainant's prior bargaining relationship was with the Utility Commission, i.e., a separate employer from the Respondent, that Respondent became the new employer of the employes of the former Utility Commission when the latter was abolished, that AFSCME is the certified bargaining representative of certain of Respondent's employes who share a community of interest with the employes of the former Utility Commission, that Respondent has filed a petition for unit clarification with the Commission requesting a determination of whether the employes of the former Utility Commission should be included in the bargaining unit of certain of Respondent's employes represented by AFSCME, and that such a determination is necessary in order to determine whether Respondent has any obligation to bargain with Complainant with regard to the employes of the former Utility Commission.

As the prefatory paragraph of this decision indicates, after hearing on the complaint the Respondent moved to have the record in this case held open to receive the record and the decision of the Commission in the unit clarification proceedings, and the undersigned subsequently granted that motion following the submission of briefs. The Commission subsequently issued its decision in the unit clarification case, as well as its Order Denying Petition for Rehearing. The parties declined the opportunity to submit additional argument in this case.

Complainant

The Complainant asserts that the issue presented in this case is whether the Respondent had an obligation to bargain with Complainant while the unit clarification petition was pending. According to Complainant, that issue has previously been decided by the Commission in its decision in Milwaukee County (Sheriff's Department) 8/ where it held that the duty to bargain continues while a unit clarification petition is pending.

Respondent

The Respondent takes the position that if its position in the unit clarification proceeding is upheld, it had no obligation to bargain with the Complainant. In support of its position, the Respondent first notes that Sec. 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. (Emphasis added.)

Respondent contends that since it was a new employer, it had the right to raise the issue of the continued appropriateness of a bargaining unit of employes of the former Utility Commission. If the bargaining unit is no longer appropriate, it had no duty to bargain with Complainant.

The Respondent also asserts that the Complainant's reliance on the Commission's decision in Milwaukee County (Sheriff's Department) is misplaced. That case and the case cited by the Commission in its decision, National Press, Inc., 9/ are distinguishable from this case in two respects. In those cases the employer and the union had been party to prior agreements, here the Respondent is a new employer different from the employer that had negotiated the previous agreements with the Complainant. Secondly, in neither of those cases was the union's majority status or the appropriateness of the bargaining unit in question. In this case the appropriateness of the existing unit is in question and if the unit is found to be inappropriate, the Complainant loses its majority status. In their respective decisions, both the Commission and the National Labor Relations Board (NLRB) noted the absence of those issues in the cases.

8/ Dec. No. 24027-B (WERC, 6/87).

9/ 241 NLRB 1000, 101 LRRM 1013 (1979).

Next, the Respondent asserts that while the NLRB and the federal courts have held as a general rule that a successor employer has a duty to bargain with the pre-existing certified representative, there are exceptions where the appropriateness of the unit is questioned. Citing, Border Steel Rolling Mills, 204 NLRB 814, 83 LRRM 1606 (1973). Respondent cites federal circuit courts of appeal decisions as holding that before the successor employer's duty to bargain with the pre-existing unit can be determined, the continued appropriateness of the unit must be determined. Citing, NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3rd Cir. 1976). In Computer Sciences Corp. v.NLRB, 677, F.2d 804, 110 LRRM 2642 (11th Cir. 1982), it was held that the NLRB was the agency to determine successorship issues, including the continued appropriateness of the unit under the new employer and that this could be done in the unfair labor practice proceeding against the new employer. In this case the Respondent cites prior decisions of the Commission as finding that a separate unit of utility employes was not appropriate based on a shared community of interest and the mandate to avoid undue fragmentation. The Respondent asserts that the appropriateness of the unit is also in doubt because the unit contains "craft employes" as well as non-craft employes, and the craft employes were never given the opportunity to vote on whether to be included in the unit or to have a separate unit of their own and they are statutorily entitled to such an election.

Lastly, the Respondent asserts that the Complainant is not the certified bargaining representative of the unit, noting that IBEW Local 494 was certified as the exclusive bargaining representative of the unit in 1965. At most, the Complainant was voluntarily recognized by the Utility Commission, and while the latter could not question the appropriateness of the unit in that case, given that the Respondent is a new employer and the existence of the AFSCME unit, the Respondent has chosen not to voluntarily recognize the Complainant and to seek a determination as to the appropriateness of the unit.

Discussion

As concluded in the Order Granting Motion to Hold Record Open, the undersigned does not read the Commission's decision in Milwaukee County (Sheriff's Department) to hold that it is a per se violation of Sec. 111.70(3)(a)4, Stats., to refuse to bargain during the pendency of a unit clarification proceeding. In affirming the Examiner's decision 10/ in that case the Commission stated:

> The basic approach adopted by the NLRB, as articulated by the Examiner, with regard to pending unit clarification petitions is sound to us. The NLRB case law has been consistent in rejecting claims that an unresolved unit clarification issue constitutes an adequate defense to a refusal to bargain charge where the majority status of the exclusive bargaining representative is not in doubt. As the NLRB stated in the National Press, Inc. decision:

10/ Dec. No. 24027-A (Schiavoni, 1/87).

> The Board has long held that where, as here, a union has demonstrated its majority and a question of unit placement of certain individuals is still unresolved, the final resolution of that question does not affect the basic appropriateness of the certified unit, the union's majority, or the obligation of the parties to bargain with respect to that unit.
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> Here, as in National Press, Inc., the Union's majority status is not in question.

Decision No. 24027-B at 5-6. Hence, where the majority status of the union or the appropriateness of the unit is in question, those questions must be decided in order to determine the municipal employer's obligation to bargain under MERA. That conclusion is consistent with the wording of Sec. 111.70(3)(a)4, Stats., which, in part, provides that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . . (Emphasis added.)

The instant case is also distinguishable from Milwaukee County (Sheriff's Department), since in that case the union and the employer had an existing bargaining relationship. In this instance, the Commission has concluded that the Respondent became the new employer of the employes of the former Utility Commission on June 20, 1988. Thereafter the Respondent made organizational changes reflected in Finding of Fact 10. While the factual circumstances of this case differ from Milwaukee County, the question of the union's majority status or the appropriateness of the unit remains critical as to determining the duty to bargain. Thus, in order to determine whether Respondent had a duty to bargain with Complainant as a successor to the Utility Commission, it is necessary to determine whether a unit of employes of the former Utility Commission remained an appropriate unit. Such an approach is consistent with that taken by the NLRB and the U.S. Supreme Court in NLRB v. Burns Int'l. Security Services, 406 U.S. 272, 80 LRRM 2225 (1972). In deciding whether the new employer succeeded to the former employer's duty to bargain with the existing union the Supreme Court held:

> II. We address first Burns' alleged duty to bargain with the union and in doing so it is well to return to the specific provisions of the Act which both courts and the Board are bound to observe. Section 8(a)(5) of the Labor Management Relations Act, 29 U.S.C. Sec. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provision of Sec. 159(a) of this title." Section 159(a) provides that "representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . ." Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative.
>
> . . .

80 LRRM at 2227. The Court went on to note that the unit had been found to be appropriate and to uphold the Board's finding that Burns had a duty to bargain with the union certified as the representative of the employes in the unit. In so doing, however, the Court noted that:

> It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.

80 LRRM at 2228. 11/

The Commission followed much the same approach in its decision in City of Clintonville, Dec. No. 19858 (WERC, 8/82), a case that similarly involved a city abolishing the utility commission and taking over its operation and employes and which raised the question of whether the city had an obligation to bargain with the existing union that represented the employes of the former utility commission. In deciding that issue the Commission concluded that:

> (I)t is appropriate to incorporate certain aspects of private sector successorship law into the application of the provisions of MERA. Thus, in this case, if there is substantial continuity in the City's operation of the Utility by its Board of Public Works, then the City's duty to bargain with the Utility Association may have survived the City's abolition of the Utility Commission.

At 10. After determining that there was "substantial continuity" between the old and the new employer, the Commission went on to state:

> Having determined that the change in circumstances resulting from the City's abolition of the Utility Commission is insufficient, in itself, to extinguish the City's duty to bargain with the Utility Association, we must determine if a separate unit of Utility employes remains appropriate.

At 11.

The Commission went on to find in Clintonville that the unit of former utility employes remained appropriate and that the city had an obligation to bargain with the certified representative of those employes. That is not the case in this instance, since in the unit clarification proceeding the Commission determined that a unit of employes of the former utility commission was not appropriate as it would constitute undue fragmentation. The Commission distinguished the parties' case, City of Oconomowoc, from Clintonville on the facts, noting that in the latter case the street department unit was limited to employes in that department and did not, as is the case with the AFSCME unit, contain blue collar employes in other departments. Also, in Clintonville the utility department remained essentially unchanged, whereas the Commission concluded in Oconomowoc that the former utility employes are no longer all in the same department. 12/ In its Order Denying Petition for Rehearing, the Commission reiterated those distinctions and further noted that the existing unit contained both craft and non-craft employes and that Sec. 111.70(4)(d)2.a., Stats., requires that the former be given a unit determination vote, and the Commission concluded that under Local 2150's position there would be the potential for two units of former utility employes in addition to the AFSCME blue collar unit. 13/

It having been concluded that the bargaining unit of employes of the former Utility Commission is not appropriate, it follows that the Respondent did not violate Sec. 111.70(3)(a)4, Stats., by refusing to recognize the Complainant as the bargaining representative of those employes and by refusing to bargain

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11/ See also, Border Steel Rolling Mills, 204 NLRB 814, 83 LRRM 1606 (1973); NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3rd Cir. 1976); Computer Sciences Corp. v. NLRB, 677 F.2d 804 (11th Cir. 1982).

12/ Dec. No. 6982-A, Dec. No. 7170-B, at 13.

13/ Dec. No. 6982-B, Dec. No. 7170-C, at 3.

with Complainant over the wages, hours and conditions of employment of those employes. Further, it is concluded that by its actions the Respondent did not discriminate against the employes within the meaning of Sec. 111.70(3)(a)3, Stats.

Based upon the record and the foregoing, the Examiner has concluded that the instant complaint must be dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of February, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner